theft of a barrel. When evidence was called it became evident that the identity of the barrel stolen with that found in possession of the Appellants was the crucial point of the case, and it became equally clear that on that point the evidence for the prosecution was inadequate. In the circumstances the charge was amended to one under Section 35(i) of Cap. 46 (Minor Offences) on which the Appellants were convicted. But it seems clear that in the case of an article in common use such as an oil drum which was the article concerned in this case possession is not a suspicious circumstance where there is no evidence that the article possessed is the one stolen. In other words this sub-section should not be resorted to help out where a charge of theft breaks down. There is a legitimate use for this sub-section, e.g., where a beggar is found with a gold watch and no charge of theft can be preferred because the owner cannot be traced, but in this present case the use was not legitimate, and a provision such as this can be oppressive if it is invoked in cases where its use is not legitimate. The conviction must be quashed.

In view of this it is not necessary to examine in detail the other point, but my view is that there is here no difficulty. The act charged is the possession. There must be circumstances which give rise to suspicion of one of two things but it is obvious that where the circumstances arise it would be impossible for the person in whose mind the suspicions were aroused to say that he suspected that the goods were stolen and not fraudulently obtained or *vice versa*. What is contemplated is suspicion of a state of affairs that can only be described by the words stolen or fraudulently obtained. In this connection compare the case of *Rex v. Teh Peng Kin* referred to in 6 Malayan Law Journal at p.226 where it was held that a conviction under a charge of "fraudulently or dishonestly destroying a valuable document" was good. I distinguish this case from those under the Motor Vehicles Enactment, which were cited to me.

Conviction quashed.

[APPELLATE CRIMINAL JURISDICTION]
TERRELL, Ag. C.J.
September 29, 1938.

PUBLIC PROSECUTOR - - Appellant.

v.

AH FATT - - - - Respondent.

(SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 85 of 1938)

Sanitary Boards Enactment, Section 17 (ii)—By-law 2 (i) of Part IV of By-laws—hawking meat without licence.

The respondent had some pork over the handle of a bicycle at Pudu Road. There was some more pork hanging on a wire fence nearby. He had some scales for weighing the pork and supplied the meat to various persons who paid him therefor. On a charge of selling pork without licence the respondent was acquitted by the Magistrate on the grounds (1) that there was no evidence that the respondent was found hawking within the Sanitary Board area and (2) that the appellant was not an "itinerant vendor" of food-stuffs and therefore did not come within the definition of "hawker" in By-law (1) of Part IV of the By-laws made under the Sanitary Boards Enactment. On appeal to the Judge by the Public Prosecutor:—

Held, that, although the first point was not taken at the trial, the evidence showed that the first witness for the prosecution who was a Health Inspector was on a look-out for unlicensed hawkers in Pudu Road and that as in so doing he was acting in pursuance of an official duty there was a presumption that such duty was regularly performed within the Sanitary Board area.

Held, further that, if a person sells food in the street where he does not live and must have reached such place by walking or riding there with his foodstuffs for sale, he thereupon becomes 'itinerant' within the meaning of Part IV of By-laws under the Sanitary Boards Enactment and he does not divest himself of the character of an itinerant hawker merely by reason of the fact that he stays or stands still on the same place for an appreciable time.

MAGISTRATE'S CRIMINAL APPEAL.

M. C. Hay, Deputy Legal Adviser, for the Appellant.

Tengku Ismail for the Respondent.

Cur. Adv. Vult.

Terrell Ag. C. J. The charge against the defendant was as follows:—

> "That you on 24.5.38 at 7 a.m. did hawk meat to wit pork at Pudu Road without a licence from the Chairman in that behalf contrary to By-law 2(i) Part IV, and punishable under section 17(ii) (Cap. 137)".

It appeared from the evidence that on the morning in question the defendant had some pork on a board over the handle of a bicycle. There was some more pork hanging on a wire fence nearby. The defendant had some scales for weighing the pork, and supplied it to various persons who paid him therefor. The learned Magistrate found as a fact that the defendant was selling pork without a licence. Nevertheless he acquitted the defendant on two grounds:—

> (1) that there was no evidence that the defendant was found hawking pork within the Sanitary Board area;
>
> and

(2) that the defendant was not an 'itinerant vendor' of food-stuffs, and therefore did not come under the definition of 'hawker' in By-law (1) of Part IV.

As regards the first point, it is to be noted that this point was not taken at the trial. If it had been taken, formal evidence would no doubt have been given. But in any case the first witness for the prosecution stated that he was a Health Inspector of the Sanitary Board, Kuala Lumpur, and was on the look out for unlicensed hawkers in Pudu Road. As he was acting in pursuance of an official duty, there is a presumption under section 114 of the Evidence Enactment (illustration 'e') that such duty was regularly performed, i.e. in the Sanitary Board area.

As regards (2), an examination of Parts IV and V of the By-laws shows that the sale of all fresh food for human consumption is strictly controlled, and can only be carried on under licence. Part V deals with the licensing of shops and premises where fresh food is sold, and Part IV deals with the sale of food in streets. This part is headed 'By-law relating to street trading'.

It appears to me obvious that if anyone sells food in the street, he is selling food in a place where he does not live, and he must have reached such place by walking or riding there with his foodstuffs for sale. Thereupon he becomes 'itinerant'. He is none the less itinerant, because he stays an appreciable time in the same place. But he does not divest himself of the character of a hawker by standing still; he merely commits a further offence under Part IVA By-law (4). In my opinion the conduct of the defendant disclosed two offences. He is only charged with one, and upon that he should have been convicted.

The appeal is, therefore, allowed, and the defendant is convicted and fined $10, or seven days rigorous imprisonment.

Appeal allowed.